



IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-1773

TEXAS INTERNATIONAL AIRLINES, INC.; DELTA AIR LINES,
INC.; AMERICAN AIRLINES, INC.; FRONTIER AIRLINES,
INC.; OZARK AIR LINES, INC.; EASTERN AIR LINES,
INC.; AND CONTINENTAL AIR LINES, INC.,
Petitioners,

v.

SOUTHWEST AIRLINES CO. AND
THE TEXAS AERONAUTICS COMMISSION,
Respondents.

**REPLY BRIEF IN SUPPORT OF PETITION
FOR CERTIORARI**

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I.

This case, as we said in our initial submission, raises no issue about whether Southwest Airlines should fly from Love Field or DFW (Petition 8). That issue, if petitioners are successful here, will be determined by the state courts in Texas. All that this Court is asked to decide is the due process issue on the extent to which one may be bound by a judgment in an action to which he is not a party and the federalism issue of enjoining state court litigation that could provide a definitive answer to

a question on which the federal courts have made a forecast.

That point bears repeating because Southwest has devoted more than half of its Brief in Opposition to an extensive restatement of the case largely devoted to matters that have no relevance to the issues presented here. In this process Southwest has misstated facts, used half-truths, misleading statements, and mistaken analogies, and gone outside the record to create a false and emotionally charged atmosphere clearly intended to prejudice the Court in its consideration of this case.

In an apparent attempt to analogize the Love Field-DFW situation with a situation with which the Court is familiar, Southwest compares Love Field and DFW to Washington National Airport and Dulles Airport and its services to Eastern's shuttle service.¹ It goes on to say that Eastern's shuttle service could not possibly survive at Dulles and that "forcing Southwest to serve Dallas through DFW will bankrupt the airline. This is why 'narrowly viewed' this case concerns only Southwest's right to serve Love Field, but, broadly viewed, it concerns Southwest's right to survive." (Southwest Brief 6) This statement has no relevance to the present issues, and is quite contrary to what Southwest is saying publicly. A report of April 11, 1977, in the *Aviation Daily* states that Mr. Lamar Muse, Southwest's President, made the following statement to the Association of Airline Analysts in New York:

"If Southwest were ordered to abandon Love Field and transfer operations to Dallas/Fort Worth Air-

¹ The analogy is a mistaken one. DFW is 17 miles from both Dallas and Fort Worth. Love Field is 7 miles from downtown Dallas. Dulles is 26 miles from Washington while National is only 3 miles away. See the *Official Airline Guide* which also shows that the average travel time from DFW to Dallas is the same as from Love Field to Dallas, and that the travel time from Love Field to Dallas is greater during rush hours.

port, business might drop off for about 90 days, but then would pick up again after passengers had 'driven the interstate' to Houston or San Antonio."

Thus while Southwest makes public statements that moving to DFW would not seriously affect it, it tells this Court that its very survival is involved.

Southwest portrays the events leading up to the construction of DFW as a sinister scheme, instigated by the CAB carriers for their economic advantage, and acquiesced in by the Cities, the Airport Board, the CAB, and the FAA (Southwest Brief 6-16). The well-documented fact is that Love Field had become saturated, it could not be expanded, and there was an overwhelming public necessity for a large new airport to serve the entire area.² This was not an economic advantage to the CAB carriers, whose landing fees increased from less than 5¢ per 1000 pounds of landed weight at Love to almost \$1.00 at DFW.

Southwest suggests that the "Certificated Air Carrier Services" covered by the "phase-out provision" were cunningly defined in the Bond Ordinance so that Southwest would be barred from Love but the CAB carriers could continue to use it for service to Texas points. It was understood by the Cities, in 1968 when the Bond Ordinance was passed, and by the CAB carriers, in 1970 when they entered into the Letter Agreements undertaking to move all their certificated services to DFW, that this definition includes all scheduled airline service of every nature whatsoever provided by CAB and TAC certificated carriers except air taxi operations. Because Southwest, by its strained reading of the Bond Ordinance, raised a question about this in the first case, petitioners, as part of their prayer for relief in the state court action,

² See, e.g., the CAB's Order E-22028 dated April 13, 1965.

have asked for a declaration that the definition in question covers all scheduled service of all major airlines.

Southwest further states that "as a consequence of their anticompetitive actions against Southwest, several of the CAB carriers are presently under grand jury investigation for violation of federal antitrust laws." (Southwest Brief 5) This gross attempt to prejudice the Court is inexcusable on its face inasmuch as it has nothing to do with this case and is not a part of the record in this case. It is particularly unfair because of the implication that a number of the petitioners are under investigation. There has never been any investigation of which petitioners are aware of any carriers other than Braniff Airways and Texas International under its prior management. Braniff is not one of the petitioners in this case. Petitioners do not believe that anyone, including Southwest, has heretofore claimed that American, Delta, Eastern, Continental, Frontier or Ozark has been involved in any anticompetitive action against Southwest. Indeed, it was Delta that subleased concourse space to Southwest at Love Field and in Houston so that it could begin its operations in 1971; it was American that agreed to handle Southwest's reservations, and it was Frontier that provided baggage services and counter space to Southwest.³ More recently, American agreed to sublease space to Southwest at El Paso so that Southwest could begin service on its new route to that City.

Southwest refers to Section 9.5 of the 1968 Bond Ordinance providing for the phase-out of Love Field and the other public airports owned by the Cities upon the opening of DFW as designed "to suppress free competition" (Southwest Brief 11). Such provisions are common, however, to secure revenues and to assure the bondholders that the issuers of the bonds will not operate competitive

³ See CAB Order 72-6-120 approving these agreements.

facilities that would result in a diversion of revenues. Moreover, the ordinance including these provisions was approved by the Attorney General of Texas.

We think that none of this has any relevance to the due process and federalism issues here presented. We have commented on several of the more glaring misstatements in Southwest's restatement of the case so that we will not be thought, by silence, to accept those statements or other statements by Southwest that have no purpose except to attempt to prejudice the Court.

II.

Both respondents take the position that the facts in this case are so unique and so unlikely to be repeated that this Court should not decide the questions raised by it (TAC Brief 2-3; Southwest Brief 39). What they overlook is that the facts in all cases are unique and unlikely to be repeated. It boggles the mind to suppose that the facts, for example, of *Brewer v. Williams*, 97 S. Ct. 1232 (1977), or *Piper v. Chris-Craft Industries, Inc.*, 97 S. Ct. 926 (1977), will ever be repeated. Yet those cases raised important legal issues on which this Court's pronouncements will provide guidance in a host of similar, though factually quite different, cases. So it is here.

The res judicata and due process questions presented by this case are not addressed in any of the decisions cited by Southwest or the TAC and, as the Fifth Circuit said, this case "requires us to refine the preclusive effect of government litigation." 546 F.2d at 99 (App. 27a). Numerous cases have arisen recently that raise this ques-

⁴ Southwest, for example, again relies (Southwest Brief 25) on *Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952), although the Fifth Circuit said: "The CAB carriers correctly distinguish *Berman* by arguing that their pecuniary interest in the success of the new airport surpasses the interests possessed by members of the general public or taxpayers." 546 F.2d at 98 (App. 27a).

tion about government litigation,⁵ and indeed this Court had such an issue before it only last term. In *Town of Lockport v. Citizens for Community Action*, 97 S. Ct. 1047 (1977), the Court held that a judgment adverse to a county, in a suit in which it purported to sue on behalf of its citizens and voters, had no preclusive effect on citizens and voters who brought their own later action, since the later plaintiffs "had not been parties to the earlier suit and were not in privity with the county of Niagara, which had brought it." 97 S. Ct. at 1051. Though we think that that holding was correct, and that it supports the position we take here, the single footnote the Court devoted to the issue is not all that needs to be said on the res judicata effect of government litigation. Beyond that, the general question of the extent to which preclusion applies to non-parties is an area in which the lower courts are reshaping the law as it had been understood and on which they need guidance from this Court.⁶

In addition, the proper relation between the state and federal courts and the extent to which federal courts should be involved in state internal affairs are important and difficult matters as a long series of this Court's decisions has shown. We have recently seen that even a unanimous decision here only five years ago was not the last word on the meaning of the "expressly authorized" exception to the Anti-Injunction Act, 28 U.S.C.A. § 2283, and that the Court is far from being of one mind about that exception. *Vendo Co. v. Lektro-Vend Corp.*, 97 S. Ct. 2881 (1977). This Court has never spoken about the

⁵ E.g., *Elliot Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970); *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201 (2d Cir. 1972); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974), vacated on other grounds 97 S. Ct. 1891 (1977); *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1974); *Patterson v. Burns*, 327 F. Supp. 745 (D. Haw. 1971).

⁶ Comment, *The Expanding Scope of the Res Judicata Bar*, 54 Texas L. Rev. 527 (1976).

"relitigation" exception since it was written into the statute in 1948, and the conflict between the decision below and the Sixth Circuit's decision in *Lamb Enterprises, Inc. v. Kiroff*, 549 F.2d 1052 (6th Cir. 1977), cert. denied 97 S. Ct. 2926 (1977), emphasizes the need for an authoritative interpretation of it.

Great reliance is placed by respondents on the argument that the only claim of petitioners is based upon the 1968 Bond Ordinance on which the Cities based their claim and that the relief sought by the CAB carriers is the same as the relief sought by the Cities. These arguments do not meet the due process point involved. Due process is not satisfied merely because a party who has not been heard before intends to present "the identical issue," *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971), nor because, as the lower court said in the *Town of Lockport* case, plaintiffs in the second case are "seeking essentially the same relief." 386 F. Supp. 1, 5 (W.D.N.Y. 1974).

III.

Southwest maintains that questions of federalism and abstention are not raised here because the decision in the first case did not present difficult questions of state law. It says that the result there was required by "the plain language of Texas constitutional and statutory provisions and the specific and recent direction of the Texas Supreme Court," citing *Texas Aeronautics Commission v. Braniff Airways, Inc.*, 454 S.W. 2d 199 (Tex. Sup. 1970) (Southwest Brief 35). As we have already shown (Petition 22), that case did not deal in any way with the question of the TAC's authority over airports of which the Fifth Circuit spoke in the first decision. It is interesting in this regard to note that the TAC now appears to admit the "absence of any relevant state court decision" (TAC Brief 11).

Since there is no state court case on whether the TAC or municipalities control municipally owned airports, the

specific power given to municipalities by the Texas Municipal Airports Act (Petition 21) casts grave doubt on the Fifth Circuit's holding that the TAC can countermand this power. These doubts are strengthened by the facts that: (1) the certificate issued to Southwest did not mention Love Field; (2) the Minute Order, in which the TAC purportedly ordered Southwest to stay at Love Field, did not mention either Southwest or Love Field; (3) the Texas Attorney General approved the Bond Ordinance, and could not have done so if the provisions phasing-out Love Field services had been beyond the power of the Cities; and (4) the Texas Legislature had ratified the Bond Ordinance. Tex. Laws. 1969, c. 47 §§ 2, 3.

Southwest and the TAC further contend that there is no question of disrupting internal state procedures or of creating needless friction because the state agencies themselves submitted the dispute to the federal court for resolution in the first case. This is not really true. The Cities brought suit in the federal court against Southwest to resolve what they contended was a federal question. They had no way of knowing that any particular state issue would be raised by Southwest or that the TAC would intervene on behalf of Southwest. Moreover, it seems likely that the Cities did not consider the state issue to be a serious one even after it was raised because of what the Cities thought was their clear power under the Texas law, the apparent lack of power of the TAC and the Attorney General's previous approval of the ordinance. The issue of the TAC's authority over airports under state law was selected by the Fifth Circuit from many issues raised in the first case.

The TAC argues here that "all doubt as to the clarity of state law as it relates to the Texas Aeronautics Commission's action with respect to Southwest and Love Field

was laid to rest by a recent statute enacted by the Texas Legislature" (TAC Brief 12). The statute, which is appended to the TAC Brief, validated "all orders * * * granting certificates of public convenience and necessity for the operation of intrastate air carriers." Apparently the TAC finds hidden meanings in this statute similar to those that Southwest found in its certificate. There is no issue whatever in this litigation about the validity of Southwest's certificate to serve "Dallas/Fort Worth," as the certificate puts it, but the certificate does not mention Love Field and the 1977 statute does not purport to validate any judicial interpretation of any particular certificate.

The TAC also finds support in a 1977 Attorney General's opinion having to do with the TAC's purported authority over private airports (TAC Brief 12). But this case involves a public airport, and would not be covered by the Attorney General's opinion, even if it is correct. Its correctness is questionable, since neither the first decision of the Fifth Circuit nor the Texas Aeronautics Commission Act (Appendix H to the Petition), which are cited by the Attorney General, say that the TAC has any power over private airports. Indeed the Fifth Circuit said: "Were Love Field a private airfield, constructed without public funds, it may be assumed that the owner could exclude anyone he liked." 494 F.2d at 776 (App. 4c).

As the recent litigation about the Concorde has shown, there is nothing inherently improbable in a regulatory scheme that leaves to local governmental authorities control over who may use airports they own. *British Airways Board v. Port Authority of New York and New Jersey*, 46 U.S.L.Wk. 2001 (2d Cir., June 14, 1977). On the face of the Texas statutes, this is the scheme Texas

has chosen. The Texas courts should be allowed to determine whether the Texas statutes mean what they say.

Respectfully submitted,

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